

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LENOIR SMITH,

Defendant and Appellant.

C082426

(Super. Ct. No. 00F09247)

Defendant Michael Lenoir Smith appeals from the trial court's denial of his petition to resentence under the Three Strikes Reform Act of 2012 (Proposition 36) based on a finding that resentencing him would pose an unreasonable risk of danger to public safety. (Pen. Code,¹ § 1170.126.) He contends the trial court erred by failing to use the

¹ Undesignated statutory references are to the Penal Code.

standard of dangerousness from the resentencing provision of the subsequently enacted Proposition 47, the Safe Neighborhoods and Schools Act. Disagreeing, we affirm.

BACKGROUND

On November 3, 2000, defendant sold rock cocaine to two undercover officers. (*People v. Smith* (Sept. 16, 2003, C041350) [nonpub. opn.] at pp. 2-5.) He had two prior federal convictions for bank robbery (*id.* at p. 23) and a prior California conviction for making a terrorist threat (*id.* at p. 20). A jury found defendant guilty of selling cocaine base. (*Id.* at p. 1.) The trial court sustained three strike allegations and sentenced defendant to 25 years to life in state prison. (*Ibid.*) We affirmed defendant's conviction on appeal. (*Id.* at p. 2.)

On November 20, 2012, defendant filed a pro. per. petition for habeas corpus arguing that his three strikes sentence should be reduced to a two-strikes sentence pursuant to Proposition 36. On January 3, 2013, the trial court ordered that the habeas petition be construed as a section 1170.126 resentencing petition. On February 25, 2013, the trial court granted defendant's motion to represent himself in the resentencing proceedings.

Numerous filings, made primarily by defendant, were submitted during the course of litigation on the petition. Evidence submitted in the filings showed that defendant had an extensive history of prior convictions in addition to his three prior strikes. Defendant also had a substantial record of prison misconduct. The trial court found that defendant was eligible for resentencing but denied the petition after finding that resentencing defendant would pose an unreasonable risk of danger to public safety, as defined in section 1170.126.

DISCUSSION

The voters passed two significant criminal reform measures, Proposition 36 in 2012, which modifies the three strikes law by requiring the third strike to be a serious or violent felony (see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168) and

Proposition 47 in 2014, which reduced a number of felony or wobbler (crimes that can be punished as either felonies or misdemeanors) offenses to misdemeanors (see *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091).

Both measures contain procedures for resentencing, under guidelines designed to preclude relief for offenders deemed to present “an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f); see § 1170.18, subd. (b).) Proposition 36 did not define this phrase, although it set forth the types of evidence the trial court could consider in applying the initiative, which gave trial courts broad discretion to determine what conduct an offender was likely to engage in that might threaten public safety.

(§ 1170.126, subd. (g).) While Proposition 47 continued to allow the use of the exact same evidence a trial court could consider (§ 1170.18, subd. (b)), it also defined this phrase to specify that the public safety risk must be a risk that the petitioner will commit a so-called “super-strike” (§ 1170.18, subd. (c); see § 667, subd. (e)(2)(C)(iv)).

Proposition 47 provided that its definition of risk to public safety would apply “throughout this Code.” (§ 1170.18, subd. (c).) Such language refers to the Penal Code as a whole. (See *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1255; *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 166.)

Defendant contends that the trial court erred by applying the section 1170.126 standard for determining danger to public safety rather than the narrower one set forth in section 1170.18, subdivision (c).² We disagree.

The goal of statutory construction “is to ascertain the Legislature’s intent so as to effectuate the purpose of the law.” (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) We look first “ ‘at the plain and commonsense meaning of the statute because it is generally

² This issue is currently before the California Supreme Court. (See, e.g., *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.)

the most reliable indicator of legislative intent and purpose.’ ” (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) If the statutory language is clear and unambiguous, the plain meaning governs, “ ‘and we need not resort to legislative history to determine the statute’s true meaning.’ ” (*Ibid.*) “[W]e do not construe statutes in isolation, but rather read every statute ‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.’ ” (*People v. Pieters* (1991) 52 Cal.3d 894, 899.)

“We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body.” (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) Such is the case here. As we explain below, the phrase “throughout this Code” must be read to mean “throughout this act” to avoid illogical and unintended consequences. (See *In re Thierry S.* (1977) 19 Cal.3d 727, 741, fn. 13 [mistaken statutory cross-reference disregarded to avoid “obvious absurdity”].)

We begin by noting that Proposition 47 makes no direct reference to modifying any part of Proposition 36. A primary goal of Proposition 47 was to reduce the cost of housing petty criminals. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70; *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) Nowhere in the ballot materials were voters informed the law would also modify the resentencing provisions of Proposition 36, which concerns recidivist inmates serving sentences for felony offenses that remain classified as felonies. The official title and summary, legal analysis, and arguments for and against Proposition 47 are all silent on what effect -- if any -- Proposition 47 might or would have on Proposition 36. (See Voter Information Guide, *supra*, at pp. 34-39.)

More importantly, the structure and content of section 1170.18 is inconsistent with the intent to apply the narrow definition of risk throughout the entire Penal Code. Section 1170.18, subdivision (n) provides: “Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.” Applying a narrow definition of risk contained in section 1170.18, subdivision (c), would necessarily diminish or abrogate the finality of judgments in cases subject to Proposition 36, that do not fall within the purview of Proposition 47. For example, defendant’s Proposition 36 petition seeks to undo his three strikes sentence while his conviction for selling methamphetamine is not a crime subject to Proposition 47 resentencing. (See § 1170.18, subd. (a).) Also, the wording of section 1170.18, subdivision (c) is inconsistent with an intent to apply it throughout the entire Penal Code. It refers to “petitioner[s]” which, throughout Proposition 47, is a term referring to persons petitioning under that act. (See § 1170.18, subsd. (b), (c), (l) & (m).) The narrow definition of risk defines a phrase that appears in only two sections of the Penal Code, sections 1170.18 (Proposition 47) and 1170.126 (Proposition 36). If the voters had intended to apply the newer Proposition 47 definition to all Proposition 36 petitions, it is difficult to imagine a more roundabout and illogical means of doing so.

More factors support our conclusion.

Propositions 36 and 47 have generally different purposes. In contrast to Proposition 47’s general purpose of reducing the cost of imprisoning petty criminals, Proposition 36’s primary goal was to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to “[m]aintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.)

The two initiatives also have generally different scopes. Proposition 36 benefits some defendants convicted of felonies with two or more strikes (serious felony convictions), whereas Proposition 47, generally speaking, benefits some persons who have committed petty felonies or wobblers that are to be reduced to misdemeanors, although some defendants may qualify for relief under both provisions. Because the would-be misdemeanants who stand to benefit from Proposition 47, as a class, are less dangerous than recidivist felons with prior strike offenses, it is logical to impose a higher dangerousness standard for them (§ 1170.18, subd. (c)) than the standard applied for recidivist felons under Proposition 36.

Finally, the timing of the two initiatives makes it unlikely that the Proposition 47 standard of dangerousness was intended to apply to Proposition 36 cases. Proposition 36 was enacted on November 6, 2012 (*People v. Etheridge* (2015) 241 Cal.App.4th 800, 804) and third strike prisoners had two years from the effective date of Proposition 36 to seek resentencing absent a “showing of good cause” (§ 1170.126, subd. (b)). Proposition 47 was enacted on November, 4, 2014, just before the expiration of the time to file Proposition 36 petitions. (*People v. Morales* (2016) 63 Cal.4th 399, 404.) It seems unlikely that any rational voter would have intended to change the rules for Proposition 36 petitions at the last moment, when nearly all petitions would already have been filed and most of them had already been adjudicated.

Given the above points, we conclude Proposition 47’s phrase “throughout this Code” must be read to mean “throughout this act.” Accordingly, the trial court did not err by using the broader definition to determine whether defendant posed an unreasonable risk to public safety and was not required to find he posed a risk of committing a “super strike” if he were to be resentenced.

DISPOSITION

The judgment (order) is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Murray, J.